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NO. 81-6143

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN WILLIAM ROOK,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

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QUESTION PRESENTED

WHETHER THE PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO "INDIVIDUALIZED CONSIDERATION" AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN BEING SENTENCED TO DEATH PURSUANT TO A STATUTE THAT PERMITTED THE JURY TO RETURN ITS RECOMMENDATION FOR A SENTENCE OF DEATH WITHOUT SPECIFYING WHICH OF THE MITIGATING CIRCUMSTANCES IT FOUND TO EXIST.

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Pursuant to the authority of Rule 22 and in the manner provided by Rule 46.5 of the Supreme Court Rules [for response to petitions filed "in forma pauperis"], the State of North Carolina responds to the petition of John William Rook and prays that this Court deny such petition on the basis of the facts and authorities hereinafter set forth for the Court's consideration.

CITATION TO OPINION BELOW

The Petitioner was tried, convicted and judgment of death was entered in the Superior Court of Wake County, North Carolina. In an opinion reported in State v. Rook, ____ N.C. ____, 283 S.E.2d 732 (1981) [No. 2 - Fall Term], the Supreme Court of North Carolina found no error in the conviction and affirmed the judgment of death.

JURISDICTION

Petitioner invokes the jurisdiction of the Supreme Court of the United States pursuant to Title 28, United States Code, Section 1257(3).

QUESTION PRESENTED

WHETHER THE PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO "INDIVIDUALIZED CONSIDERATION" AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN BEING SENTENCED TO DEATH PURSUANT TO A STATUTE THAT PERMITTED THE JURY TO RETURN ITS RECOMMENDATION FOR A SENTENCE OF DEATH WITHOUT SPECIFYING WHICH OF THE MITIGATING CIRCUMSTANCES IT FOUND TO EXIST.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States:

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Amendment XIV

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. This case also involves the following provisions of the General Statutes of North Carolina:

> "§14-17 . . . A murder which shall be perpetrated by means of poison, lying in wait,

imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon, shall be deemed to be murder in the first degree, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life as the court shall determine pursuant to G.S. 15A-2000."

§15A-2000 [See Appendix A of Response to Petition for Writ of Certiorari, infra; this is included only because Appendix D of Petitioner's Petition for Writ of Certiorari is incomplete.]

STATEMENT OF CASE

The evidence of record presented by the State during the guilt-innocence phase of this bifurcated proceeding tended to show that at approximately 7:20 p.m. on May 12, 1980, Ann Marie Roche, a registered nurse, was walking home along a street in Raleigh, North Carolina. As she was nearing an intersection, the defendant who was operating a borrowed automobile, turned in front of Ms. Roche and blocked her path. The defendant beckoned Ms. Roche and she approached the car. The two began talking for several minutes and then began arguing and, within seconds, the defendant began to beat her. (R. pp. 122-126)*

All of this was observed by two witnesses, a homeowner and a jogger. The jogger approached the car just as defendant was beating Ms. Roche, observed that her face and arms were cut and bleeding, and saw the defendant was crouching over her, armed with a stick or some other object about one or two inches in diameter. The jogger asked if he could help and the defendant replied, "just go on, man, this doesn't concern you." Both witnesses observed the vehicle leave with Ms. Roche in the passenger seat with her head down, crying. The jogger wrote down the license number of the vehicle and gave a copy to the homeowner. (R. pp. 123-128)

[*R.p. indicates page numbers of Record on Appeal where the the testimony can be located.]

Two other persons were eyewitnesses to the struggle between Ms. Roche and defendant. In all, three individuals positively identified the defendant as the assailant and the other eyewitness gave a description which matched that of the defendant. (R. pp. 126-131)

On May 13, 1980, at approximately 7:30 p.m. a policeman on routine patrol at Dorothea Dix Hospital in a large, remote, open field discovered a pile of clothing and a billfold. A short distance away, he observed a body and notified other officers. (R. pp. 108-109) Subsequently, a crime scene specialist was called to the scene and he observed a white female body, badly bruised and battered with cuts and abrasions. The ground around the body was covered with blood. The body was nude and was approximately thirty-five feet from the pile of clothing. The body was identified as Ann Marie Roche. (R. pp. 97-108, R. p. 122)

The pathologist testified that his autopsy showed numerous injuries to the victim. He observed cuts on the front part of her body, all parallel. The cuts were straight and uniform in depth, and in the pathologist's opinion, had been deliberately inflicted "with some care and effort " and were made by a knife. (R. p. 166) He also found numerous lacerations on her head and hands which were, in his opinion, produced by beating with a long, blunt instrument with a round striking surface. In addition to numerous cuts and abrasions, the victim's left leg was completely fractured and broken; the pelvis was fractured and separated; her rib was broken; severe internal bleeding had occurred; and he found injuries to the vaginal area which, in his opinion, could have been produced by forcible sexual intercourse. The compression injuries in the pelvic region were consistent with the victim having been struck by an automobile. The pathologist estimated that the victim could have remained alive from a period of two hours to twenty-four

hours after receiving the injuries she sustained. His opinion was that Ms. Roche died as a result of loss of blood from the many injuries he observed. (R. pp. 164-174)

A State Bureau of Investigation forensic serologist testified that he visited the crime scene and performed numerous tests. One particular observation was that a large bloody smear was, in his opinion, consistent with a large bloody object, like a body, being rolled or dragged down the slope of the field. He also subsequently examined the automobile and found blood in numerous places consistent with that of the victim. He also performed tests on the vaginal and anal smears taken from the victim during the autopsy and found the presence of spermatozoa. (R. pp. 111-117)

From the license number recorded by the eyewitnesses to the kidnapping, the police were able to trace the car and locate the owner. The owner was questioned and she stated that it had been borrowed prior to the offense and returned shortly thereafter by the defendant. The owner's description of the defendant's dress and appearance matched that of the eyewitnesses. (R. pp. 159-164)

The defendant was taken into custody and thereafter a search warrant was obtained to search defendant's residence and the vehicle. A pair of bloodstained blue jeans and a knife were recovered. (R. p. 136) An expert testified that the blood on the jeans was consistent with that of the victim and could not have originated from the defendant. (R. p. 117)

On May 15, 1980, officers began interviewing the defendant. After advising him of his Miranda rights, the defendant executed a waiver of those rights, and gave the officers a statement. In that statement, he admitted borrowing the automobile and observing the victim walking along the road. He admitted scuffling with her and driving her to the field. He further stated that he told her to get out of the car and that he "tried to get into her pants." He stated that she resisted and

he went to the trunk of the vehicle, removed a tire tool and struck the victim several times. He then proceeded to have forcible sexual intercourse and that he continued to strike her with the tire tool and a knife. He then attempted anal intercourse and when she again resisted, he hit her again and she just laid there bleeding. He stated that he got in his car and admitted running over the victim, although he stated he did not do so intentionally. He said that he spun the tires to free the car and drove home. (R. pp. 141-151)

The defendant offered no evidence during the guilt determination phase of the trial.

Upon receiving the jury verdict finding defendant guilty of first degree murder, first degree rape, and kidnapping, the trial court convened the sentence determination phase of the trial before the same jury. The State offered no evidence during this phase choosing to rely instead on the evidence introduced at the guilt determination phase. The defendant presented evidence from his brother and sister describing in great detail their life with their parents. Also, the defendant presented the testimony of two psychiatrists, a neighbor, and his wife. (R. pp. 202-235)

At the conclusion of the testimony, the trial court instructed the jury on the sentencing phase. Three aggravating circumstances were submitted to the jury: (1) whether the murder was committed while the defendant was engaged in the commission of the rape of the victim; (2) whether the murder was committed while the defendant was engaged in the commission of the kidnapping of the victim; and (3) whether the murder was especially heinous, atrocious or cruel. Sixteen mitigating circumstances were submitted to the jury. (R. pp. 258-260) The jury found beyond a reasonable doubt each of the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty. The jury also found one or more mitigating circum-

stances, although it did not designate which of the sixteen were found, and then found beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances. The jury then returned a recommendation that the death penalty be imposed, and the court entered judgment imposing the death penalty for the crime of first degree murder. Defendant also received consecutive life sentences for the crimes of kidnapping and first degree rape. (R. pp. 260-268)

The defendant appealed his conviction and sentence to the North Carolina Supreme Court. The Court found no error in either phase of the trial. A further summary of the facts can be found as set forth in the opinion of the Court in State v. Rook, ____ N.C. ____, 283 S.E.2d 732 (1981), a copy of which is attached to the Petition for Writ of Certiorari as Appendix A.

REASONS WHY THE WRIT SHOULD NOT ISSUE

THERE IS NO CONSTITUTIONAL OR STATUTORY REQUIREMENT THAT THE JURY MAKE SPECIFIC FINDINGS ON MITIGATING CIRCUMSTANCES AND THE FAILURE OF THE SUPREME COURT OF NORTH CAROLINA TO SO REQUIRE DOES NOT VIOLATE PETITIONER'S RIGHT TO "INDIVIDUALIZED CONSIDERATION" AS A CONSTITUTIONAL REQUIREMENT IN IMPOSING THE DEATH SENTENCE.

Petitioner contends that it is prejudicial error, of constitutional dimensions, for the jury to return a sentence recommendation of death under a procedure whereby the jury is not required to specify which of the mitigating circumstances it finds, or does not find. Petitioner contends that such a procedure violates his Eighth and Fourteenth Amendment rights under the United States Constitution. There is no merit in this contention for there is no statutory or constitutional requirement that the jury make specific findings and, furthermore, the Petitioner cannot demonstrate any prejudice in the instant

case.

G.S. 15A-2000, which sets out the procedures for the sentencing phase in a capital case, requires the jury to indicate in writing which of the aggravating circumstances it finds beyond a reasonable doubt. G.S. 15A-2000(c) provides as follows:

> "(c) Findings in Support of Sentence of Death. - When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which shall show:
>
> (1) The statutory aggravating circumstance or circumstances which the jury finds beyond reasonable doubt; and
>
> (2) That the statutory aggravating circumstance or circumstances are sufficiently substantial to call for the imposition of the death penalty; and,
>
> (3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found."

There is, thus, no requirement that the jury find the mitigating circumstances submitted to them in writing. It is sufficient under the statute that they find, in writing, only that any mitigating circumstances found are insufficient to outweigh any aggravating circumstances found in returning a recommendation of death. In the instant case, the jury found the three aggravating factors submitted to them beyond a reasonable doubt.[1] The

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[1]The aggravating factors submitted to the jury together with the jury's answers are as follows (R. p. 258):

> "(1) Was this murder committed while John William Rook was engaged in the commission of the rape of Ann Marie Roche?
> Answer: Yes
>
> (2) Was this murder committed while John William Rook was engaged in the commission of the kidnapping of Ann Marie Roche?
> Answer: Yes
>
> (3) Was this murder especially heinous, atrocious, or cruel?
> Answer: Yes"

second issue required the jury to unanimously find beyond a reasonable doubt that the aggravating circumstances so found by them to be sufficiently substantial to call for the imposition of the death penalty. They answered that issue "Yes". (R. p. 258) They then proceeded to issue three which reads together with their answer on the verdict sheet as follows (R. p. 259):

> "ISSUE THREE:
>
> Do you find one or more mitigating circumstances:
>
> Answer: Yes
>
> BEFORE YOU ANSWER ISSUE THREE, CONSIDER EACH OF THE FOLLOWING MITIGATING CIRCUMSTANCES. YOU NEED NOT INDICATE ON THIS FORM WHICH MITIGATING CIRCUMSTANCE YOU DO OR DO NOT FIND.
>
> IF YOU FIND ONE OR MORE OF THE MITIGATING CIRCUMSTANCES FROM THE EVIDENCE WRITE, "YES", IN THE SPACE AFTER ISSUE THREE, ABOVE. IF YOU DO NOT FIND ANY MITIGATING CIRCUMSTANCES, WRITE, "NO", IN THAT SPACE."

Finally, in issue four, the jury was required to unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances outweigh the mitigating circumstance or circumstances. They answered that issue "Yes" and entered a sentence recommendation of death. (R. p. 260) It is clear that the procedure followed in the instant case fully comports with the requirements of G.S. 15A-2000.

However, Petitioner argues that such procedure violates this Court's decision in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) in that the Petitioner was denied "individualized consideration" as required by the Eighth and Fourteenth Amendments. To the contrary, G.S. 15A-2000(f) states (see Appendix A attached hereto):

> "(f) Mitigating circumstances. - Mitigating circumstances which may be considered shall include, but not be limited to, the following:
>
> ****
>
> (9) Any other circumstance arising from the evidence which the jury deems to have mitigating value."

In State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979), the Supreme Court of North Carolina held that any relevant circumstance proffered by the defendant as having mitigating value which is supported by the evidence and which the jury may reasonably deem to have mitigating value must, upon defendant's timely request, be submitted to the jury in writing. The Court stated at page 72:

> "If, however, a defendant makes a timely request for a listing in writing of possible mitigating circumstances, supported by the evidence, and if these circumstances are such that the jury could reasonably deem to have mitigating value, we are of the opinion that the trial judge must put such circumstances on the written list.
>
> The legislature did not intend to give those mitigating circumstances expressly mentioned in the statute primacy over others which might be included in the 'any other circumstance' provision. Such an intent, if it existed, might run afoul of Lockett v. Ohio, supra, 438 U.S. 586.
>
> ****
>
> Under Lockett a legislature would be free to provide that the existence of certain mitigating factors would preclude the imposition of the death penalty, while the existence of others should simply be considered, but not as controlling, on the question. A death penalty sentencing structure, however, which by its terms or the manner in which it is applied, puts some mitigating circumstances in writing and leaves others to the jury's recollection might be constitutionally impermissible under the reasoning of Lockett. For if the sentencing authority cannot be precluded from considering any relevant mitigating circumstance supported by the evidence neither should such circumstances be submitted to it in a manner which makes some seemingly less worthy of consideration than others."

It is clear that both G.S. 15A-2000 and the North Carolina Supreme Court's construction of that statute do not preclude the jury from considering as a mitigating factor, ". . . any aspect of a defendant's character or record and any of the circumstances of the offense that defendant proffers as a basis for a sentence less than death. . ." [Lockett v. Ohio, supra, at p. 604.] In the instant case, some sixteen mitigating circumstances, including the "catch-all" [15A-2000(f)(9)]

circumstance, were submitted in writing to the jury.[2] Thus,

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[2]The mitigating factors submitted to the jury in the instant case were (R. pp. 259-260):

"(1) That this murder was committed while John William Rook was under the influence of mental or emotional disturbance.

(2) The capacity of John William Rook to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

(3) The age of John William Rook at the time of this murder is a mitigating circumstance.

(4) John William Rook, in his formative years, was subjected to cruelty and physical abuse by his parents.

(5) John William Rook, in his formative years, was subjected to mental abuse by his parents.

(6) John William Rook, in his formative years, was subjected to emotional abuse by his parents.

(7) John William Rook has been a loving and affectionate husband to his wife.

(8) John William Rook has been loving and affectionate to his brothers and sisters and their children.

(9) John William Rook is an alcoholic.

(10) John William Rook is an abuser of drugs and is addicted to drugs.

(11) John William Rook was sexually abused by an older man whom he lived with when he was 10 years old in order to have a more stable home environment.

(12) John William Rook had a deprived and chaotic childhood in which he was schooled in violence and criminality by his parents.

(13) John William Rook now has an IQ of 71 and received very little education in his formative years.

(14) John William Rook, in his formative years, received very little religious and moral training.

(15) John William Rook confessed in detail as to what he did and cooperated with the detectives and investigators of the Raleigh Police Department and Wake County Sheriff's Department as to his involvement.

(16) Any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value."

the procedure followed fully comports with Lockett.

What is at issue here is simply whether the jury is constitutionally required to specifically record after each mitigating factor on the verdict sheet whether or not they so found, instead of generally indicating that they found one or more mitigating circumstance. The State of North Carolina submits that there is no such constitutional requirement. This Court in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) upheld the Georgia statutory scheme for the imposition of the death penalty. G.S. 15A-2000 is similar to the Georgia statutory scheme. In Georgia, once guilt is determined, the same jury hears evidence concerning the circumstances of the crime and the criminal before making a sentence recommendation. The Georgia statute does not list any factor which constitutes a mitigating circumstance but rather allows the jury to determine whether any facts proved at the sentencing hearing mitigate against imposition of the death penalty. Ga. Code Ann. § 27-2534.1 (1978). As well, the trial court in charging the jury need not single out specific mitigating circumstances. See Spivey v. State, 241 Ga. 477, 246 S.E.2d 288, cert. denied, 439 U.S. 1039, 99 S.Ct. 642, 58 L.Ed.2d 699 (1978); Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978); Thomas v. State, 240 Ga. 393, 242 S.E.2d 1 (1977). The Georgia Supreme Court in the case of Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. denied, 445 U.S. 946, 100 S.Ct. 1346, 63 L.Ed.2d 781 (1980) held that it was not error for the trial court to refuse to charge on specific mitigating factors sought by the defendant. They held that the Georgia courts are not required to note specific mitigating factors in charging the jury. As stated earlier, this scheme has been approved as constitutional in Gregg. A fortiorari, the State of North Carolina respectfully submits that G.S. 15A-2000(f), which sets out specific statutory mitigating circumstances and the decision of the North Carolina Supreme Court in State v. Johnson, supra, requiring the trial

courts to submit those statutory circumstances, supported by the evidence, as well as any others which are not listed in the statute, when requested by the defendant and supported by the evidence, provides, under Lockett analysis, a more reliable safeguard against arbitrary and excessive death sentences than does the Georgia procedure. The State of North Carolina contends that by requiring the court to submit the aggravating circumstances arising from the evidence to the jury and requiring the jury to so find in writing properly limits and guides the jury's discretion. Georgia has a similar requirement with respect to aggravating circumstances. Ga. Code Ann. § 27-2534.1(c). No such constitutional necessity exists with respect to the mitigating factors.

The North Carolina Supreme Court in upholding the constitutionality of G.S. 15A-2000 in State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), cert. denied, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137, reh. denied, 448 U.S. 918, 101 S.Ct. 40, 65 L.Ed.2d 1181 (1980) stated at p. 352:

> "While the present North Carolina statute enumerates several mitigating factors to be considered by the jury, it does not limit the jury in its consideration of mitigating factors. A North Carolina jury is specifically empowered to consider '[A]ny other circumstance arising from the evidence which the jury deems to have mitigating value.' In short, while the jury's discretion to impose the death penalty is sharply limited, it retains wide discretion to consider the particular circumstances of the defendant and his conduct so that the punishment which is ultimately imposed is not grossly disproportionate to the crime."

Both G.S. 15A-2000 and the Constitution require the jury to specifically find or not to find each aggravating circumstance because such procedure provides an exercise of guided discretion. However, the jury should remain absolutely unfettered when it comes to considering mitigating factors. A requirement that the jury list each mitigating circumstance might unduly constrain the jury. Requiring the jury to submit in writing which mitigating factors are found may inhibit the jury and prevent them

from considering other mitigating circumstances. This is particularly true with respect to the 15A-2000(f)(9) "catch-all" provision. Petitioner's argument that the jury must be required to designate which of the mitigating factors it finds or does not find, by logical necessity, must include a requirement that the jury list which "other" mitigating factors it finds from all of the evidence. Only then can the reviewing courts know precisely all of the circumstances the jury finds to have mitigating value, whether listed on the jury form or not. To require the jury to so list these factors, the State contends, may limit the jury's discretion which Lockett teaches must remain unbridled. See Collier v. State, supra, 261 S.E.2d, at p. 376.

The Texas statute approved by this Court in Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) does not require a listing by the jury of each mitigating factor found. Texas Code Crim. Pro. § 37.071. The Texas statute, in fact, does not even explicitly speak of mitigating circumstances, but rather directs the jury to answer three questions regarding punishment after certain aggravating factors have been found to exist by virtue of a finding of guilt. This Court found that in reaching the answers to those questions evidence in mitigation could be considered and, consequently, the statute was constitutional. G.S. 15A-2000, as compared to the Texas statute, is clearly more likely to provide to the Petitioner the kind of "individualized consideration" as required by Lockett. In fact, G.S. 15A-2000 is significantly more narrow than both the statutes upheld in Gregg and Jurek with respect to aggravating factors; and, far superior with respect to statutory mitigating factors since they are required to be submitted in writing (as well as others arising from the evidence pursuant to State v. Johnson, supra). The State of North Carolina submits that there is simply no constitutional requirement of specific findings on mitigating circumstances.

Petitioner further argues that he is prejudiced upon appeal where the North Carolina Supreme Court was required to determine whether the capital sentence "was imposed under the influence of passion, prejudice, or any other arbitrary factor," or whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." G.S. 15A-2000(d)(2). There is absolutely no merit in this contention. In the absence of a specific finding by the jury as to the existence or non-existence of each mitigating factor submitted to them, our Supreme Court in reviewing a silent record with respect to this issue will be obligated to assume that the jury found each mitigating factor so submitted to them when they answer issue three "Yes." Thus, in the instant case, the Supreme Court of North Carolina was forced to assume that the jury found all sixteen mitigating factors, which the State would argue that it likely did not find. Such result, therefore, inured to the benefit of the Petitioner and to the detriment of the State. The Petitioner simply was not prejudiced by the failure of the jury to specifically list which mitigating factors it so found. The opinion below in the instant case makes that point clearly, 283 S.E.2d at pp. 752-753:

> "Even were we to accept defendant's argument, we perceive no prejudice to defendant here. Even assuming that the jury accepted all sixteen mitigating circumstances as true, we still could not conclude that the death sentence was arbitrary, excessive or disproportionate. The circumstances of this murder are cruel and gruesome almost beyond belief: a young female, a stranger to the defendant, was stopped while walking home in a residential area while it was still daylight. Almost immediately, defendant began beating her and pulling her around by her hair. He forced her into his car and drove to a deserted field. There, by his own admission, he beat her and cut her with a knife until he gained her submission. Then, he raped her and when he was through, left her to die from her wounds, slowly bleeding to death. The jury found that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. We are unable to disturb the jury's finding and to conclude otherwise. In summary, we find no statutory provision to support defendant's contention nor do we find such a constitutional requirement. Even if

> authority could be found to support defendant's claim, his assignment would be of no avail because he is unable to demonstrate any prejudice whatsoever."

As noted above, the failure of the jury to specifically find each mitigating circumstance does not prejudice the Petitioner but rather prejudices the State. While the opinion below specifically finds it is better practice for the jury to specify which mitigating factors it finds and does not find "for the benefit of this Court in reviewing the appropriateness of the death penalty," the beneficiaries of such a practice will be the State of North Carolina. For, as in the instant case, the failure of the jury to be required to do so puts the Supreme Court of North Carolina in the position of having to assume that the jury found all the mitigating circumstances submitted as well as any other circumstance arising from the evidence that has mitigating value. A review of the evidence of record reveals that the trial court was quite liberal in submitting all sixteen mitigating circumstances. In any event, it is clear that Petitioner was not prejudiced in the appellate review of his sentence by the failure of the jury to be required to record whether or not they found each mitigating circumstance.

Finally, the Georgia statute like G.S. 15A-2000 requires that the jury make specific findings only on aggravating circumstances. Appellate review in Georgia is limited to a consideration of the facts of the crime and the aggravating circumstances found by the jury. Ga. Code Ann. § 27-2537(c). The North Carolina statutory scheme is similar to that of Georgia in that appellate review is likewise limited to a consideration of the circumstances of the crime and the aggravating circumstances found by the jury. This Court has fully and exhaustively reviewed the Georgia statute and procedures and has found them to be constitutional. Gregg v. Georgia, supra. Therefore, there exists no constitutional requirement of specific findings on mitigating circumstances and failure to so require does not

preclude the trial jury from affording to a defendant the "individualized consideration" as a constitutional prerequisite in imposing a sentence of death.

CONCLUSION

The Respondent respectfully submits that Petitioner's Petition for Writ of Certiorari should be denied for he fails to set forth any meritorious basis upon which relief sought should be granted. The State of North Carolina submits that there is no constitutional or statutory requirement that the jury make specific findings on mitigating circumstances and the failure of the North Carolina Supreme Court to so require does not violate Petitioner's rights under the Eighth and Fourteenth Amendments to the United States Constitution. The Petitioner received a fair and impartial trial and was convicted upon overwhelming competent evidence. The sentence of death was imposed by a constitutionally acceptable procedure and such sentence is supported by the evidence. In this regard the sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor. The sentence was imposed under a unambiguous statutory scheme which provides for limited and guided jury sentence recommendations which assure consistency, fairness and restrained discretion.

Respectfully submitted this the 25th day of February, 1982.

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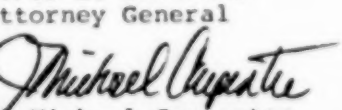

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ATTORNEYS FOR RESPONDENT

(2) When a motion for appropriate relief is made during the 10-day period, the case remains open for the taking of an appeal until the expiration of 10 days after the court has ruled on the motion.

(3) The jurisdiction of the trial court with regard to the case is divested, except as to actions authorized by G.S. 15A-1453, when notice of appeal has been given and the period described in (1) and (2) has expired.

(4) If there has been no ruling by the trial judge on a motion for appropriate relief within 10 days after motion for such relief has been made, the motion shall be deemed denied.

(5) The right to appeal is not waived by withdrawal of an appeal if the appeal is reentered within the time specified in (1) and (2).

(6) The right to appeal is not waived by compliance with all or a portion of the judgment imposed. If the defendant appeals, the court may enter appropriate orders remitting any fines or costs which have been paid. The court may delay the remission pending the determination of the appeal.

(1977, 2nd Sess., c. 1147, s. 29.)

Effect of Amendments. — The 1977, 2nd Sess., amendment, effective July 1, 1978, rewrote subdivisions (3) and (4) of subsection (a).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

CASE NOTES

Failure of Trial Judge to Rule within 10 Days. — There was no merit to defendant's contention that the trial judge erred in failing to rule upon his motion for appropriate relief, since defendant did receive a ruling on his motion under subsection (a)(4) of this section which provides that, if no ruling has been made by the trial judge on a motion for appropriate relief within 10 days, the motion is deemed denied. State v. Brooks, 49 N.C. App. 14, 270 S.E.2d 592 (1980).

Applied in State v. Ervin, 38 N.C. App. 261, 248 S.E.2d 91 (1978).

Cited in State v. Morris, 41 N.C. App. 164, 254 S.E.2d 241 (1979); State v. Evans, 46 N.C. App. 327, 264 S.E.2d 766 (1980).

SUBCHAPTER XV. CAPITAL PUNISHMENT.

ARTICLE 100.

Capital Punishment.

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(a) Separate Proceedings on Issue of Penalty. —

(1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is

discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury. — Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death. — When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review of Judgment and Sentence. —

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

(e) Aggravating Circumstances. — Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

(f) Mitigating Circumstances. — Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.
(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.
(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.
(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.
(5) The defendant acted under duress or under the domination of another person.
(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.
(7) The age of the defendant at the time of the crime.
(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.
(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value. (1977, c. 406, s. 2; 1979, c. 565, s. 1; c. 682, s. 9; 1981, c. 652, s. 1.)

Effect of Amendments. — The first 1979 amendment added subdivision (11) to subsection (e).

The second 1979 amendment, effective January 1, 1980, inserted "or a sex offense" near the middle of subdivision (5) of subsection (e).

The 1981 amendment inserted "homicide" near the middle of subdivision (5) of subsection (e). Session Laws 1981, c. 652, s. 2, provides: "This act is effective upon ratification and applies to capital felonies committed on or after that date."

Session Laws 1979, c. 565, s. 2, provides: "This act is effective upon ratification and shall apply to all offenses committed after the date of its ratification." The act was ratified May 14, 1979.

Session Laws 1979, c. 682, ss. 13 and 14, provides:

"Sec. 13. All laws and clauses of laws in conflict with this act are hereby repealed, provided however, nothing in this act shall be construed to repeal any portion of Article 26 of Chapter 14 which relates to offenses against public morality and decency.

"Sec. 14. This act shall become effective January 1, 1980, and shall apply to offenses occurring on and after that date. Nothing herein shall be construed to render lawful acts committed prior to the effective date of this act [January 1, 1980] and unlawful at the time the said acts occurred, and nothing contained herein shall be construed to affect any prosecution instituted under any section repealed by this act pending on the effective date hereof."

Session Laws 1979, c. 682, s. 12, contains a severability clause.

Legal Periodicals. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

For comment on capital punishment and evolving standards of decency, see 16 Wake Forest L. Rev. 737 (1980).

For comment on capital sentencing statute, see 16 Wake Forest L. Rev. 765 (1980).

CASE NOTES

Constitutionality. — For discussion of the constitutionality of the North Carolina Death Penalty Statutes, see State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), cert. denied, 448 U.S. 907, 100 S. Ct. 3050, 65 L. Ed. 2d 1137, rehearing denied, 448 U.S. 918, 101 S. Ct. 41, 65 L. Ed. 2d 1181 (1980).

For discussion of factors governing interpretation of the death penalty statute, see State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

Imposition of Penalty Not Mandatory. — The present North Carolina death penalty statutes are not mandatory in nature but instead